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Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–69–01 OF 2012
RAMLY ALI FCJ, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
13 MAY 2013

B

Banking — Banker and customer — Loan facilities — Terms and conditions — Whether bank obliged to release funds in the face of customer's non-compliance with pre-disbursement conditions — Whether bank had waived pre-disbursement conditions — Whether reasonable for bank to terminate banking facilities due to non-fulfillment of pre-disbursement conditions

C

D

Civil Procedure — Pleadings — Failure to plead — Issue of waiver not pleaded — Waiver forming pillar of plaintiffs' claim — Whether waiver could not be raised or considered by court

E

Contract — Terms — Condition precedent — Bank failing to release funds — Whether bank obliged to release funds in the face of customer's non-compliance with pre-disbursement conditions — Whether bank had waived pre-disbursement conditions — Whether reasonable for bank to terminate banking facilities due to non-fulfillment of pre-disbursement conditions

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The first plaintiff had obtained loan facilities from the defendant for the purpose of taking over and operating a then existing prawn farm owned and operated by the second plaintiff. The defendant had by two separate letters of offer to the first plaintiff granted a revolving Murabahah working capital financing to the limit of RM700,000; and a cash note facility in the sum of RM750,000. However, despite the acceptance of the letters of offer and the creation of third party legal charges upon two landed properties respectively, the defendant refused to disburse the financing facilities to the first plaintiff. The plaintiffs therefore commenced this suit alleging breach of contract between the first plaintiff and the defendant. The defendant denied any breach of contract and contended that the first plaintiff had failed to fulfill the defendant's standard conditions precedent for the disbursement of the banking facilities as stipulated in the letters of offer. The defendant contended that the taking over or acquisition of 100% share of the second plaintiff by the first plaintiff was a condition precedent ('the condition precedent') before the disbursement of the banking facilities could be made. The trial judge in allowing the plaintiffs' claim held that there was sufficient evidence to show that the defendant had waived the condition precedent. The learned judge

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therefore held that the issue of the first plaintiff's failure to fulfill the condition precedent did not arise. The defendant appealed against this decision.

Held, allowing the appeal:

(1) The defendant's obligation to disburse the banking facilities must first be preceded by the first plaintiff having completed the taking over of the second plaintiff's assets and liabilities and subsequently obtain the relevant documents of title or interest in respect of the acquisition of the second plaintiff. If the first plaintiff failed to fulfill this obligation, then the defendant was not bound to disburse the banking facilities to the first plaintiff. It was reasonable for the defendant to terminate the banking facilities granted to the first plaintiff, particularly when the condition precedent to the disbursement were not fulfilled by the first plaintiff (see paras 14 & 16).

(2) The question of waiver to the condition precedent was never pleaded in either the plaintiffs' statement of claim nor in any reply to the defendant's defence. It was not even listed in the issues for trial prepared by the plaintiffs' solicitors. In civil proceedings parties are bound by their respective pleadings. The issue of waiver in the present case formed the pillar of the plaintiffs' claim against the defendant. The plaintiffs' pleaded case was different from the plaintiffs' case presented in court for which judgment was sought against the defendant. In deciding a matter before the court, the court must rely solely on the pleadings prepared by the parties to the proceedings (see paras 18–19).

(3) The issue of 'waiver' could not be raised and could not be considered by the trial judge in determining the plaintiffs' claim against the defendant. The trial judge erred in his conclusion that the defendant had already waived the said condition precedent (see para 21).

(4) There was no clear evidence adduced to indicate that the defendant had waived the condition precedent (see para 23).

(5) Even assuming that the defendant had by conduct waived the condition precedent, cl 6.3 of the agreement provided that such waiver shall not prejudice the right of the defendant from insisting on the first plaintiff's compliance with such waived condition at any subsequent time (see para 25).

[English summary

Plaintif pertama telah mendapatkan pinjaman kemudahan daripada defendan bertujuan untuk mengambil alih dan mengendalikan penternakan udang sedia ada yang dikendalikan oleh plaintif kedua. Defendan telah memberikan kepada plaintif dua surat tawaran berasingan pusingan Murabahah pembiayaan modal kerja dengan had RM700,000; dan kemudahan tunai

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berjumlah RM750,000. Walaupun begitu, meskipun dengan penerimaan surat tawaran dan pembentukan gadaian pihak ketiga ke atas kedua-dua hartanah tersebut, defendan enggan membayar kemudahan pembiayaan kepada plaintif pertama. Plaintif-plaintif oleh itu memulakan tindakan guaman mendakwa kemungkiran kontrak antara plaintif pertama dan defendan. Defendan menafikan apa-apa kemungkiran kontrak dan menegaskan bahawa plaintif pertama gagal untuk memenuhi piawaian syarat terdahulu untuk pembiayaan kemudahan sebagaimana ditetapkan di dalam surat tawaran. Defendan menegaskan bahawa pengambilalihan atau perolehan saham sebanyak 100% daripada plaintif kedua oleh plaintif pertama adalah syarat terdahulu ('syarat terdahulu') sebelum pembiayaan kemudahan perbankan dapat dibuat. Hakim bicara dalam membenarkan tuntutan plaintif memutuskan bahawa terdapat keterangan mencukupi untuk menunjukkan defendan telah pun mengecualikan syarat terdahulu. Hakim yang bijaksana oleh itu memutuskan bahawa isu kegagalan plaintif pertama untuk memenuhi syarat terdahulu tidak timbul. Defendan merayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan:

(1) Kewajipan defendan untuk membiaya kemudahan perbankan mestilah didahului dengan plaintif pertama selesai mengambil alih aset dan liabiliti plaintif kedua dan seterusnya mendapatkan dokumen-dokumen hak milik atau kepentingan yang berkaitan dengan pengambilalihan plaintif kedua. Jika plaintif pertama gagal untuk memenuhi kewajipan tersebut, maka defendan tidak terikat untuk membiaya kemudahan perbankan kepada plaintif pertama. Adalah berpatutan untuk defendan menamatkan kemudahan perbankan yang diberikan kepda plaintif pertama, terutama sekali apabila syarat terdahulu pembiayaan tidak dipenuhi oleh plaintif pertama (lihat perenggan 14 & 16).

(2) Persoalan pengecualian syarat terdahulu tidak pernah dipli sama ada di dalam penyata tuntutan plaintif mahupun dalam apa-apa jawapan kepada pembelaan defendan. Malahan tidak disenaraikan di dalam isu-isu untuk perbicaraan yang disediakan oleh peguam plaintif. Dalam prosiding sivil pihak-pihak terikat dengan pliding masing-masing. Isu pengecualian dalam kes membentuk teras tuntutan plaintif terhadap defendan. Kes yang dipli oleh plaintif berbeza dengan kes yang dikemukakan di mahkamah yang mana penghakiman dipohan terhadap defendan. Dalam memutuskan perkara di hadapan mahkamah, mahkamah mesti bergantung semata mata atas pliding yang disediakan oleh pihak-pihak kepada prosiding (lihat perenggan 18–19).

(3) Isu 'waiver' tidak boleh dibangkitkan dan tidak boleh dipertimbang oleh hakim bicara dalam menentukan tuntutan plaintif terhadap defendan. Hakim bicara terkhilaf dalam keputusannya bahawa defendan telah pun mengecualikan syarat terdahulu tersebut (lihat perenggan 21).

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(4) Tiada keterangan yang jelas untuk menunjukkan bahawa defendan telah mengecualikan syarat terdahulu (lihat perenggan 23).

(5) Meskipun dengan menganggap bahawa defendan telah dengan tindakannya mengecualikan syarat terdahulu, klausa 6.3 perjanjian memperuntukkan bahawa pengecualian itu tidak akan memprejudis hak defendan daripada memaksa pada kepatuhan plaintif pertama dengan syarat pengecualian pada sebarang masa berikutnya (lihat perenggan 25).]

Notes

For cases on condition precedent, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6580–6590.

For cases on failure to plead, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6717–6721.

Cases referred to

Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd [2001] 4 MLJ 321; [2001] 4 CLJ 261, CA (folld)

Menah Sulong v Lim Soo & Anor [1983] 1 CLJ 26, FC (refd)

RHB Bank Bhd (substituting Keong Yik Bank Bhd) v Kwan Chew Holding Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (folld)

Appeal from: Suit No T(22) 29 of 2006 (High Court, Tawau)

Abdul Gani Zalika (Johari & Zelika) for the appellant/defendant.
Liew Hon Min (Liew Hon Min & Co) for the respondents/plaintiffs.

Ramly Ali JCA (now FCJ) (delivering judgment of the court):

[1] This is an appeal by the defendant against the decision of the learned High Court judge at Tawau High Court made on 23 December 2011 whereby the plaintiffs' claim against the defendant was allowed on the ground that the defendant was liable for breach of contract for its failure to disburse the financing facilities earlier granted by the defendant to the first plaintiff.

BRIEF FACTS

[2] The facts of the case are as follows:

(a) On or about 6 November 2003, the first plaintiff applied to the defendant at its Tawau branch for loan facilities up the sum of RM1,500,000 for the purpose of taking over and operating a then existing prawn farm owned and operated by Panduan Era Sdn Bhd (the second plaintiff) at Jurangan, Tawau;

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(b) In support of its application for the loan facilities, the first plaintiff submitted to the defendant a set of supporting documents and having evaluated the documents, the defendant had on 8 March 2004 by two separate letters of offer to the first plaintiff granted the following Islamic banking loan facilities, namely:

(i) a revolving *Murabahah* working capital financing to the limit of RM700,000; and

(ii) a cash note facility in the sum of RM750,000;

(c) The capital financing facility was offered by the defendant to the first plaintiff as a working capital for the purpose, inter alia, to finance the latter for the purchases of goods, raw materials, parts and equipment and other expenses in relation to the first plaintiff's prawn farming business. Meanwhile the cash note facility was offered to the first plaintiff as a term loan facility to redeem the CL land and NT land from Affin Bank Bhd;

(d) The first plaintiff accepted both the defendant's offers on 11 March 2004 and in consideration of the defendant's agreement to grant the two loan facilities, the second plaintiff at the request of the defendant executed one set of memorandum of charge with annexure on or before 28 June 2004 to create a third party second charge upon CL105331913 as security for the two loan facilities granted by the defendant. The charge was registered on 24 July 2004 under Memorial No 30312062/63;

(e) In consideration of the defendant's agreement to grant the two loan facilities, the third plaintiff at the request of the defendant executed one set of memorandum of charge with annexure on or before 28 June 2004 to create a third party second charge upon NT103024273 as security. This charge was later registered under Memorial No 101000052/53 on 29 July 2004;

(f) In furtherance to the acceptance of the defendant's offers, the first plaintiff and the defendant executed the following documents prepared by Messrs Chin, Mirdin & Co in preparing, drawing up and execution of the loan documentations:

(i) cash note facility:

()the asset sale agreement dated 28 June 2004;

()the asset sale purchase dated 28 June 2004; and

()the *Qurdh al-Hassan* loan agreement dated 28 June 2004.

(ii) capital financing facility:

()the financing facility agreement dated 28 June 2004;

(g) In reliance to the defendant's promise to grant the loan facilities, the first

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plaintiff commenced its tiger prawn culture project in July 2004 including pond preparation and hatchery operation and further incurred costs on prawn feedings and general business operation;

(h) Despite the acceptance of the letters of offer by the first plaintiff and the creation of the second charge upon the CL land and the NT land respectively, the defendant refused or failed to disburse and/or allow the drawdown of the loans to the first plaintiff;

(i) By reason of the defendant's delay to allow drawdown the cash note facility, the outstanding sum due from the second and third plaintiffs to Affin Finance Bhd under the first legal charge upon the CL land and the NT land respectively was levied with interest and the total outstanding sum of RM750,000 had accrued to approximately RM811,000 by October 2004. This difference of RM61,000 was subsequently paid by the plaintiffs but still the defendant refused or failed to allow the drawdown;

(j) On 11 December 2004 the first plaintiff wrote a letter to Bank Negara Malaysia explaining their position. The defendant then by a letter cancelled both the cash note facility and the capital financing facility without assigning any reason;

(k) On 24 January 2005, the first plaintiff appealed to the defendant's chief executive officer in Kuala Lumpur, requesting the latter to reinstate both the facilities. In response, the defendant reinstated both the facilities on 31 March 2005 with three additional conditions;

(l) On 11 July 2005, the defendant terminated both the facilities;

(m) By reason of the foregoing alleged breaches of the defendant, the first plaintiff has lost the opportunity to acquire an existing prawn aquaculture business in the second plaintiff and has suffered loss of profit and damages.

THE PLAINTIFFS' CLAIMS

[3] In their statement of claim, the first plaintiff claimed against the defendant, inter alia, for:

(a) loss of profit to be assessed;

(b) special damages for a sum of RM701,714.47

(c) interest and costs.

[4] The second and third plaintiffs claimed for:

(a) damages to be assessed;

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(b) a mandatory injunction that the defendant do cause to be discharged the second third party legal charge held under Memorial No 30312062/63 upon CL10533913 and the second legal charge held under Memorial No 101000052/53 upon NT10302473; and

(c) costs.

[5] The plaintiffs' case is that despite the acceptance of the letters of offer and the creation of the second third party legal charges upon the two landed properties respectively, the defendant, as the lender bank, still refused or failed to disburse and to allow the drawdown of the financing facilities to the first plaintiff and therefore was in breach of the contract between the first plaintiff and the defendant.

[6] The defendant, on the other hand denied any breach of the contract on its part as alleged by the plaintiffs and contended that the first plaintiff as the borrower had failed to fulfil and comply with the defendant's standard conditions precedent for the disbursement of the banking facilities as stipulated in the Letters of offer and other related security documents relating to the facilities.

FINDINGS OF THE HIGH COURT

[7] The case went on for full trial at the High Court. At the conclusion of the trial, the learned High Court judge found that the plaintiffs have, on the balance of probabilities proven their claims against the defendant and ruled that the defendant was in breach of the contract which resulted in the plaintiffs suffered loss and damages. The learned High Court judge entered judgment in favour of the plaintiffs.

[8] In finding in favour of the plaintiffs, the learned High Court judge ruled that the withdrawal and cancellation of the banking facilities by the defendant vide the letter dated 17 January 2005 was bad in law. The learned judge also ruled that the imposition of three additional conditions by the defendant vide a letter dated 18 April 2005 was also bad in law. On the issue of the conditions precedent for disbursement of the facilities, the learned judge ruled that there was sufficient evidence to show that the defendant had already waived the condition of the first plaintiff taking over 100% equity of Panduan Era Sdn Bhd and therefore the issue of the first plaintiff's failure to fulfil or comply with the conditions precedent did not arise.

OUR FINDINGS

[9] The plaintiffs' complaint is that the defendant was in breach of the contract for its failure or refusal to disburse or to allow drawdown of the

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banking facilities despite the acceptance of the letters of offer and the creation of the second third party legal charge upon the two landed properties. The defendant on the other hand claimed that the non-disbursement of the banking facilities was due to the first plaintiff's failure to fulfil or to comply with the conditions precedent prior to the disbursement as stipulated in the letters of offer.

[10] Based on both contentions by the respective parties, the issue to be determined by the court is whether the defendant was in breach of the contract for failure or refusal to allow disbursement or drawdown of the banking facilities to the first plaintiff. In determining the issue, the court must first consider whether the relevant conditions precedent have been effectively waived by the defendant, as alleged by the plaintiffs.

[11] The defendant contended that the taking over or acquisition of 100% share of the second plaintiff ie Panduan Era Sdn Bhd by the first plaintiff is a condition precedent before the disbursement or drawdown of the banking facilities can be made. The learned High Court judge ruled that the taking over of 100% shares of Panduan Era Sdn Bhd by the first plaintiff was a condition precedent. At pp 5–6 of the grounds of judgment the learned High Court judge ruled:

> The issue is whether the taking over or acquisition of 100% share of the second plaintiff ie Panduan Era Sdn Bhd by the first plaintiff Aquasix Corporation Sdn Bhd is a condition precedent before the drawdown can be made amongst other things.
>
> It was the first plaintiff who had applied for the said loan vide their letter dated 6 November 2003 wherein they said that 'we are keen to take over a tiger prawn farming company Panduan Era Sdn Bhd locate at Jurangan in the district of Tawau. That would mean that the loan facility is required to take over Panduan Era Sdn Bhd assets and liabilities and this will involve the taking over of 100% shares in the said company. It makes no commercial sense if it is not 100% take over. Seen from DW1's evidence the defendant bank intended the loan for the benefit and use of the first plaintiff. It is not a loan intended to benefit the second plaintiff. Hence rule that the taking over of 100% of Panduan Era Sdn Bhd by the first plaintiff is a condition precedent.'

[12] The banking facilities granted by the defendant to the first plaintiff was for the purpose of taking over 100% shares in a tiger prawn farming company Panduan Era Sdn Bhd (the second plaintiff) at Jurangan in the District of Tawau. Clause 4.1 of the cash note facility agreement dated 28 June 2004 (at p 465 of the records of appeal) provides that the bank (the defendant) 'shall subject to Article VI, disburse the loan upon receiving the Borrower's (the 1st Plaintiff's) Notice of Drawdown of the loan in the form set out in the Schedule within one (1) month from the date of the Agreement so as to enable the

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Borrower to purchase the Foreign Currency or the Accepted Bill - Islamic as the case may be.' It must be stressed here that the obligation of the bank (the defendant) to disburse the financial facilities was *subject to Article VI* of the said agreement.

[13] Article VI provides for 'Conditions for Disbursement of Loan'. Under cl 6.2(c) of the said article VI:

> The obligation of the Defendant to disburse the Loan shall also be subject to the following conditions:
>
> (c) The Borrower (the 1st Plaintiff) shall have furnished to the Bank (the Defendant) the relevant documents evidencing its title to and interest in the Property.

[14] The 'relevant documents evidencing its title to and interest in the Property' in the context of the said agreement relates collectively to the title and interest in the aquaculture farm held under NT10302427 and CL 105331913 (as defined in article 1 of the agreement). In other words, it relates to the title to and interest in the prawn farm owned and operated by Panduan Era Sdn Bhd (the second plaintiff) at Jurangan, Tawau. The defendant's obligation to disburse or to allow drawdown of the banking facilities must first be preceded by the first plaintiff furnishing to the defendant the relevant document of title on the said property or farm. In order to do that the first plaintiff must have completed the taking over of the second plaintiff's assets and liabilities and subsequently obtain the relevant documents of title or interest in respect of the acquisition of the second plaintiff. If the first plaintiff fails to fulfill this obligation, then the defendant is not bound to disburse or to allow drawdown of the banking facilities to the first plaintiff. PW1 in his evidence in court, confirmed that the first plaintiff had not furnished to the defendant the relevant documents of title or interest in respect of the taking over.

[15] The acquisition of the second plaintiff is ownership of the properties or assets by the first plaintiff in this case was by way of acquisition of 100% shareholding and taking over of the targeted company (ie the second plaintiff by the first plaintiff). In order to fulfill this condition precedent under cl 6.2(c) of the agreement, the first plaintiff must prove to the satisfaction of the defendant about the progress of the acquisition and taking over process of the second plaintiff before the defendant was obliged to disburse the facilities under the said agreement. The complete acquisition or taking over of the second plaintiff which owned and operated the prawn farm at the material times was essential and became part of the terms and conditions of the banking facilities. The letter of offer dated 8 March 2004 clearly states that 'the solicitors shall have confirmed that the assignment of the properties have been registered in the relevant land office and the Registrar of Companies'.

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[16] Even though there is no time limit set in the agreement for the taking over or acquisition of the second plaintiff's shares by the first plaintiff, it is trite law that it must be done within a reasonable time after the letters of offer were accepted by the first plaintiff. In the present case, the two letters of offer were issued and accepted by the first plaintiff on 8 March 2004 based on an application dated 6 November 2003. The defendant terminated the banking facilities on 11 July 2005. PW1 admitted in his evidence in court that the first plaintiff had not at any time furnished to the defendant the relevant documents evidencing its title to and interest in the property in question. Under the circumstances, it was reasonable for the defendant, as a financial institution, to terminate the banking facilities earlier granted to the first plaintiff, particularly when the conditions precedent to the disbursement were not fulfilled by the first plaintiff.

[17] The issue of waiver was also raised and relied upon by the learned High Court judge. The learned judge ruled that even if the 100% taking over of the second plaintiff by the first plaintiff was a condition precedent to the disbursement of the loan, that requirement was waived as can be seen by the conduct of the defendant. In his grounds of judgment the learned judge said:

> But the Plaintiffs say that the Defendant never raise this issue with the 1st Plaintiff that the 1st Plaintiff must acquire 100% of the 2nd Plaintiff shareholding but instead proceeded with transaction as if it is not a condition precedent and the Defendant bank is deemed to have waived such condition when the Defendant issued a letter of undertaking to Affin Bank Berhad on 26th May 2004 wherein they undertook to redeem the debt of RM750,000 with the facility they granted to the 1st Plaintiff Aquasix upon of the registration of the second charge or 30 days upon receipt of the title deeds whichever is earlier.

[18] We noted from the various pleadings in the records of appeal, that the question of waiver to the conditions precedent was never pleaded in either the plaintiffs' statement of claim nor in any reply to the defendant's defence. It was not even listed in the Issues for Trial prepared by the plaintiffs' solicitors. In civil proceedings parties are bound by their respective pleadings. This is trite law. The issue of waiver in the present case formed the pillar of the plaintiffs' claim against the defendant, particularly when the defendant had raised the issue of conditions precedent in its defence. At least the plaintiffs could have raised the issue of waiver in their reply to the defendant's defence. This was not done. In our view the plaintiffs' pleaded case was different from the plaintiffs' case presented in court for which judgment was sought against the defendant.

[19] In deciding a matter before the court, the court must rely solely on the pleadings prepared by the parties to the proceedings. This has been stressed by the Federal Court in the case of *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26 where it was held:

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I think it is necessary in this case to emphasize once again that the court should give their decision in strict compliance with the pleadings.

[20] The same sentiment was also expressed by the Federal Court in the case of *RHB Bank Bhd (substituting Keong Yik Bank Bhd) v Kwan Chew Holding Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665 as follows:

On this, we would like to add that it is not the duty of the court to invent or to create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to the given set of facts.

[21] Following the above principle of law, we are of the view that the issue of 'waiver' should not be raised and should not be considered by the learned High Court judge in determining the plaintiffs' claim against the defendant. The learned High Court judge after finding that the requirement as to the taking over or acquisition of 100% shares of the second plaintiff by the first plaintiff as a condition precedent to the disbursement of the loan facilities should not proceeded to find that those conditions precedent were waived by conduct of the defendant. In this case, it is our considered view that the learned judge had erred in his conclusion that the defendant had already waived the said condition precedent.

[22] In any event, even assuming the issue of waiver of the conditions precedent was to be considered, it must be considered within the perimeter of the relevant agreement and related documents. Clause 6.2 (c) of the relevant agreement provides that the first plaintiff as 'the Borrower shall have furnished to the Bank the relevant documents evidencing its title to and interest in the Property.' Clause 6.3 deals with 'waiver of conditions'. It provides:

It is hereby expressly acknowledged and declared that the conditions hereinbefore contained are inserted for the sole benefit of the Bank and may therefore be waived wholly or in part by the Bank at the sole and absolute discretion of the Bank without prejudicing the rights of the Bank under any document entered into between the Bank and/or the Borrower and such waiver shall not prejudice the rights of the Bank from insisting on the Borrower's compliance with any such waived conditions at any subsequent time.

[23] In the first place, we find no clear evidence adduced during trial, either oral or documentary to indicate that the defendant had waived the requirement for the taking over of 100% shares in the second plaintiff by the first plaintiff prior to the disbursement of the loan facilities in question. The learned judge's

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conclusion that the conditions precedent were waived by the defendant was based on his reasoning that the defendant had acted contrary to the three repeated legal advice given by Messrs Chin Mirdin & Co, a legal firm who was on the panel of the defendant's panel of lawyer, acting for the first plaintiff, and that the defendant had never made known to the first plaintiff of its insistence of the 100% taking over of the shareholding of the second plaintiff.

[24] The issue of this condition precedent is expressly provided for under cl 6.2(c) of the agreement — 'that the Borrower (1st Plaintiff) shall have furnished to the Bank (the Defendant) the relevant documents evidencing its title to and interest in the Property.' This is a pre-disbursement condition of the financing facilities that the first plaintiff need to fulfil and comply. The first plaintiff had accepted and signed the said agreement without any complaint or reservation. The first plaintiff was fully aware of the contents of the said agreement. Therefore there is no necessity for the defendant to further communicate or put in writing to the first plaintiff in order to insist its request for the fulfilment and compliance of the said condition by the first plaintiff. There is no provision in the said agreement or other related documents requiring the defendant to do so.

The following ruling by the Court of Appeal in *Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd* [2001] 4 MLJ 321; [2001] 4 CLJ 261 can be a good guidance:

> The general rule is that a party to a contract must perfom exactly what he undertook to do (*Chitty on Contract*, (26th Ed), Vol 1 para 1991). It is not open to the courts to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them whit what the courts think the parties ought to have intended.

[25] Even assuming that the defendant has by conduct waived the said condition precedent as found by the learned High Court judge, it must be looked at in the context of cl 6.3 of the agreement which provides that 'such waiver shall not prejudice the right of the Bank (the defendant) from insisting on the Borrower's (the first plaintiff's) compliance with such waived condition at any subsequent time'.

[26] The defendant's letter to Messrs Chin Mirdin & Co dated 1 November 2004 clearly indicates that the defendant had no intention to waive the said condition precedent. The relevant part of the letter is now reproduced as follows:

> Perkara-perkara berikut diambil perhatian:
>
> 1. Sebelum ini pihak Aquasix Corporation Sdn Bhd (ACSB) melalui 'proposal'/kertas kerja kepada BIMB memaklumkan bahawa ACSB diwujudkan

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untuk mengambil alih 100% dalam pegangan saham PESB. Sehingga Surat Tawaran Bank dikeluarkan tidak ada pengesahan yang menyatakan pengambil alihan telah selesai dilakukan.

CONCLUSION

[27] Based on the above considerations we are of the same view with the learned High Court judge that the taking over or acquisition of 100% shares in Panduan Era Sdn Bhd (the second plaintiff) by the first plaintiff was a condition precedent for the disbursement of the loan facilities in question; and such condition precedent had not been waived by the defendant; and the first plaintiff had failed to fulfil or comply with the said condition precedent in order to effect disbursement of the loan facilities. Therefore, by reason of the said non-compliance by the first plaintiff, the defendant cannot be said to be in breach of the agreement as alleged by the plaintiffs and thus, the plaintiffs' claim against the defendant must fail.

[28] For the above reasons, we allow the appeal with costs of RM10,000 to be paid by the plaintiffs (the respondents in the present appeal) to the defendant (the appellant in the present appeal). We also order that the decision of the High Court be set aside and the deposit be refunded to the defendant (the appellant).

Appeal allowed.

Reported by Kanesh Sundrum